BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHIRLEY A. DAMRON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,039,526
STATE OF KANSAS	)	
Respondent	)	
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Fund	)	

ORDER

Respondent and its insurance fund appealed the July 16, 2012, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Workers Compensation Board heard oral argument on November 6, 2012.

APPEARANCES

Jan L. Fisher of Topeka, Kansas, appeared for claimant. Bryce D. Benedict[1] of Topeka, Kansas, appeared for respondent and its insurance fund (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The parties agreed at oral argument that: (1) Dr. Do's May 23, 2011, IME report is part of the record; (2) all of the preliminary hearing, regular hearing and deposition transcripts and exhibits thereto in Docket Nos. 1,039,526; 1,028,933; 1,033,846 and 1,053,691 are part of the record with the exception of the exhibits to the depositions of Drs. Prostic and Sankoorikal that are in issue; (3) respondent concedes claimant aggravated her preexisting left and right wrist conditions by accident arising out of and in the course of her employment and that claimant sustained a 10% functional impairment

[1] Respondent is now represented by Nathan D. Burghart of Lawrence, Kansas.

to each wrist; (4) if the Board finds that claimant can give notice of her accident by repetitive trauma prior to the date of accident, then respondent concedes claimant gave timely notice; (5) if the Board finds that claimant can provide timely written claim of her accident by repetitive trauma prior to the date of accident, then respondent concedes claimant provided timely written claim; (6) if the Board finds the ALJ correctly determined claimant's date of accident was September 6, 2007, then respondent concedes the ALJ's finding concerning claimant's average weekly wage is correct; (7) if the Board determines that claimant's right and left shoulder and left elbow injuries arose out of and in the course of her employment, then respondent concedes ALJ Avery correctly determined claimant sustained functional impairments of 10% to the left elbow, 10% to the right shoulder and 5% to the left shoulder; and (8) claimant does not contest ALJ Avery's finding that claimant had a preexisting 6% right shoulder functional impairment.

ISSUES

This is a claim for injuries involving both upper extremities. In the July 16, 2012, Award, ALJ Avery determined: (1) claimant sustained a series of accidental injuries arising out of and in the course of her employment with respondent; (2) claimant's date of accident in this claim is September 6, 2007; (3) claimant satisfied the requirements of written claim; (4) respondent acknowledged in its report of accident that it had received timely notice; (5) the parties stipulated to a base wage of $408.80 per week and when including fringe benefits, claimant's average weekly wage increased to $589.05 beginning July 1, 2011; (6) claimant sustained functional impairment to her shoulders (10% for the right and 5% for the left) as rated by Dr. Phillips, functional impairment to her upper extremities at the forearm level (10% for each) and left elbow (10%) as rated by Dr. Ketchum, and a credit is given to respondent for claimant's preexisting impairment of 6% to the right shoulder as a result of a July 8, 2004, settlement award; (7) claimant is permanently and totally disabled; and (8) claimant is entitled to future medical care upon application and review and unauthorized medical care up to the applicable statutory limit. The ALJ awarded claimant temporary total and permanent total disability benefits and granted a credit to respondent for the July 8, 2004, settlement award for claimant's right shoulder.

Respondent contends ALJ Avery erroneously excluded evidence from the record by granting claimant's objections to certain exhibits offered by respondent at the depositions of Drs. Prostic and Sankoorikal. ALJ Avery did not address that issue in the Award. Respondent maintains the date of accident for claimant's left wrist injury was September 6, 2007, and the date of accident for her right wrist injury was August 19, 2009. Next, respondent contends claimant failed to give timely notice and provide timely written claim for the series of accidents that resulted in her alleged right upper extremity injuries.

Respondent asserts the presumption of permanent total disability does not apply where there are two scheduled injuries that occurred on different dates. If there is only one date of accident, respondent argues the presumption still does not apply as case law supports a statute's plain reading. Respondent asserts a plain reading of the permanent

total disability statute, K.S.A. 44-510c, is that the presumption arises only if there is a complete loss of or loss of use of bilateral body parts. Furthermore, respondent contends that if claimant is permanently and totally disabled, the evidence shows it is not because of claimant's upper extremity injuries, but is instead attributable to claimant's other physical ailments.

In her brief, claimant asked the Board to affirm the ALJ's findings on the issues of date of accident, notice, timely written claim and the nature and extent of disability. Claimant, at oral argument, asked the Board to affirm the ALJ's finding that claimant sustained right and left shoulder and left elbow injuries by accident arising out of and in the course of her employment with respondent. Claimant's position on the disputed exhibits is set out later in this Order.

The issues before the Board on this appeal are:

1. Should Exhibits 3, 6, 7 and 8 of Dr. Prostic's deposition and Exhibit 3 of Dr. Sankoorikal's deposition be considered part of the record?

2. What is the correct date or dates of claimant's series of repetitive trauma accidents?

3. Did claimant give timely notice to respondent of the repetitive series accidents that allegedly resulted in her right upper extremity injuries?

4. Did claimant provide timely written claim for the repetitive series accidents that allegedly resulted in her right upper extremity injuries?

5. What is claimant's average weekly wage?

6. Did claimant sustain right and left shoulder and left elbow injuries by accident arising out of and in the course of her employment with respondent?

7. What is the nature and extent of claimant's disability?

8. Is there a rebuttable presumption that claimant is permanently and totally disabled?

9. Is claimant permanently and totally disabled?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

A brief history of claimant's work-related accidents is in order. Claimant filed applications for hearing in Docket Nos. 1,028,933 (back injury), 1,033,846 (back injury), 1,039,526 (bilateral upper extremity injuries) and 1,053,691 (back injury). An award was issued in each claim, but only the Award in Docket No. 1,039,526 was appealed.

In the application for hearing filed in this claim, it was asserted claimant's date of accident was "a series to on or about March 2, 2007," that the cause and source of the accident was "repetitive motion" and the extent of injuries claimed was "Both shoulders, both arms, body and all parts injured or affected by injury including any and all systems and any and all aggravations of preexisting conditions."[2]

In the Award, ALJ Avery detailed claimant's work activities, medical treatment and other pertinent facts, which the Board adopts as its own. The Board, however, also finds the facts set out below are significant.

Claimant has a significant history of bilateral upper extremity complaints. On August 5, 2002, while working for respondent, an Employer's Report of Accident was completed indicating claimant had pain in her right shoulder, arm and neck that began in April 2002.[3] The cause of the injury was listed as repetition from sorting mail. Another Employer's Report of Accident was completed on November 25, 2002, indicating claimant had left shoulder pain that began a few days earlier due to repetition from opening and sorting mail.[4]

In February 2007, claimant met with administrator Doug Hollandsworth and his supervisor, Mike Michaels. She recalled telling Mr. Michaels the job was "killing me."[5] Claimant did not recall if she told them that the repetitive nature of her job was one of the problems. As a result of the meeting, in March 2007 claimant was transferred to the job of receptionist.

Due to downsizing, in June 2010 claimant's job duties changed to that of a data entry clerk. Claimant testified that as a result of her bilateral upper extremity injures, she could no longer perform that job. She last physically worked for respondent in September 2010.[6] Claimant testified she then took medical leave to take care of her husband, who was ill. On October 31, 2011, claimant took early retirement under an

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[2] Application for Hearing (filed Apr. 3, 2008).

[3] Sankoorikal Depo., Ex. 4.

[4] *Id.*, Ex. 5.

[5] Claimant Depo. (Docket No. 1,039,526) at 20.

[6] Claimant Depo. (Docket No. 1,028,933) at 7.

incentive program offered by respondent. Claimant testified that she is receiving Social Security disability and KPERS retirement benefits.

Claimant took the deposition of Lori Temple, a claims adjustor employed by respondent. Ms. Temple testified that she interviewed claimant about her upper extremity claim and prepared an Employer's Report of Accident dated February 16, 2007. That report lists February 16, 2007, as the date claimant reported her upper extremity injuries to respondent. Ms. Temple acknowledged knowing about claimant's repetitive injuries on February 16, 2007. Ms. Temple testified that she accepted the claim as compensable from day one. She never denied timely notice, nor timely written claim. Ms. Temple testified that she authorized Dr. Zhengyu Hu to perform an EMG within six months of February 17, 2007. Ms. Temple also approved payment of medical bills for treatment of claimant's upper extremities, including treatment provided by Drs. Kenneth Gimple and Lynn D. Ketchum. Before paying the bills, Ms. Temple would review the medical records from the doctors and knew claimant was being treated by Drs. Gimple and Ketchum.

The parties agreed that Dr. Gimple was the first authorized treating physician who gave claimant restrictions. He did so on September 6, 2007, the date he performed a left carpal tunnel release and anterior transposition of the ulnar nerve at the left elbow.

At the request of her attorney, on March 28, 2008, claimant was evaluated by orthopedic surgeon Dr. Sergio Delgado. He was asked to evaluate claimant's upper and lower back, right shoulder, bilateral carpal tunnel syndrome and left cubital tunnel syndrome. Dr. Delgado's impressions with regard to claimant's upper extremities were bilateral shoulder impingement syndrome with clinical weakness and residuals of bilateral carpal tunnel syndrome. As to causation, Dr. Delgado stated, "I believe causation of her complaints appears to be related to work activities performed."[7] Using the AMA *Guides*,[8] the doctor provided claimant with the following functional impairments: 10% for each shoulder and 10% to each upper extremity at the level of the wrist.[9]

In a June 20, 2008, Order, ALJ Avery authorized Dr. Thomas P. Phillips to assess what additional treatment was necessary for claimant's shoulders. If no additional treatment was necessary, he was to provide an opinion on functional impairment. Claimant was evaluated by Dr. Phillips on August 1, 2008. Claimant's chief complaint to Dr. Phillips was of bilateral shoulder pain with her right worse than the left. She attributed the bilateral shoulder pain to repetitive work activities. Claimant gave a history of right shoulder surgery in 2002, which consisted of an acromioplasty and resection of the distal clavicle.

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[7] P.H. Trans. (Sept. 24, 2008), Cl. Ex. 2 at 4.

[8] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[9] P.H. Trans. (Sept. 24, 2008), Cl. Ex. 2 at 5.

Dr. Phillips physically examined claimant and ordered x-rays of her shoulders. His impression was status post right shoulder surgery and mild impingement of the left shoulder. He opined that as a result of her work-related injuries, in accordance with the AMA *Guides*, claimant sustained a 10% functional impairment for the right shoulder and a 5% functional impairment for the left shoulder. He restricted claimant to no overhead lifting with either shoulder, lifting no more than five pounds to the chest and refrain from reaching.

In a separate June 20, 2008, Order, ALJ Avery authorized Dr. Lynn D. Ketchum to assess what additional treatment was necessary for claimant's upper extremities. If no additional treatment was necessary, he was to provide an opinion on functional impairment. Claimant was evaluated by Dr. Ketchum on July 29, 2008. The doctor's report indicated claimant had left carpal tunnel symptoms, which she reported to her employer in January 2007. Dr. Ketchum's report stated claimant was sent to Dr. Hu for an EMG and that Dr. Hu diagnosed claimant with mild right carpal tunnel syndrome.

Dr. Ketchum ordered nerve conduction studies of the median nerve at both wrists and the left ulnar nerve. He diagnosed claimant with bilateral carpal tunnel syndrome, mild on the right and mild to moderate on the left. He also diagnosed claimant with atrophy and weakness secondary to ulnar nerve compression at the left elbow, with significant weakness and atrophy in the left hand. He restricted claimant from repetitive gripping or repetitive use with either hand and felt her job as a receptionist was appropriate for the foreseeable future. Dr. Ketchum indicated claimant would be a candidate for a right carpal tunnel release at some point in time. Dr. Ketchum opined that within a reasonable degree of medical certainty, claimant's bilateral carpal tunnel syndrome and left ulnar nerve compression were caused by her repetitive work activities.

Following his evaluation, Dr. Ketchum was authorized by respondent to treat claimant. On August 19, 2009, he performed a right carpal tunnel release. Following the surgery, Dr. Ketchum provided follow-up care until November 19, 2009. Dr. Ketchum again saw claimant on July 27, 2010. Claimant was having continuing problems with her left ulnar nerve at the elbow. Dr. Ketchum's diagnosis was traction neuritis of the left ulnar nerve. On September 20, 2010, Dr. Ketchum performed a second left cubital tunnel release.

On December 15, 2010, during an office visit with Dr. Ketchum, claimant made right upper extremity complaints. Dr. Ketchum injected claimant's right wrist and right third digit with Kenalog. Dr. Ketchum again saw claimant on January 18, 2011. At that time, claimant felt as though she could no longer do her job. Dr. Ketchum referred claimant for a functional capacity evaluation to determine her permanent restrictions.

On February 11, 2011, claimant participated in the functional capacity evaluation, but the conclusions were that claimant provided an invalid effort. Dr. Ketchum saw

claimant on March 22, 2011, and opined she was at maximum medical improvement. He also restricted claimant from lifting more than two pounds.

Dr. Ketchum provided ratings of 10% for claimant's left elbow, 10% for the right carpal tunnel syndrome and 10% for the left carpal tunnel syndrome. He indicated his opinions were given pursuant to the *Guides*.

Claimant was evaluated in June 2010 for a lumbar injury by Dr. John M. Ciccarelli. Dr. Ciccarelli indicated claimant had multiple orthopedic complaints involving her hands, shoulders, neck, hips, knees and feet. Claimant had multilevel degenerative changes in her back, as well as degenerative spondylolisthesis at L4-5. Dr. Ciccarelli noted claimant was bound to her motor scooter, but opined that her back condition alone was not the prevailing factor, only a contributing factor, leading to her current disabilities and immobilities.[10]

On April 11, 2011, ALJ Avery issued an Order authorizing Dr. Pat D. Do to evaluate claimant and to determine what treatment, if any, was necessary to cure and relieve the effects of claimant's right shoulder injury. He was not asked to give a causation opinion. In Dr. Do's May 23, 2011, IME report, his impressions were status post right shoulder surgery and right AC joint arthritis. Despite not being asked to give a causation opinion, the doctor stated in his report:

> Within a reasonable degree of medical probability, I do not think her current complaints of right AC joint pain is due to work related injuries nor is it a natural and probable consequence of that work injury. This is a very common problem I see in middle age females and females her age that developed AC joint arthritis, but certainly not after right hand surgery.[11]

Dr. Do also opined claimant had a 6% functional impairment to the right upper extremity with regard to the right shoulder. He restricted claimant to not use the right shoulder overhead more than 33% of the day, lift no more than five pounds above the shoulder, and lift no more than 15 pounds from the waist to the shoulder. Dr. Do was not deposed.

Dr. Joseph G. Sankoorikal, board certified in physical medicine and rehabilitation, was deposed on April 16, 2012. He treated claimant from 2003 through 2012. Dr. Sankoorikal initially saw claimant on August 27, 2003. Claimant complained of fibromyalgia and pain in both shoulder joints, but mostly on the right. Dr. Sankoorikal testified that, "Mostly I have treated her upper part of the shoulder blade and trapezius area

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[10] P.H. Trans. (April 8, 2011), Cl. Ex. 2.

[11] Do IME Report (May 23, 2011) at 2.

through injections, short course of therapies, and other conservative measures -- medications."[12]

Respondent introduced several exhibits at Dr. Sankoorikal's deposition. Exhibit 3 was claimant's medical records covering a period of 1999 through 2002 from Kansas Medical Clinic Family Practice.[13] Claimant objected to Exhibit 3 on the grounds that Dr. Sankoorikal had not seen those records and did not rely on them to render his opinions. Exhibit 9 was physical therapy notes from St. Francis Hospital and Medical Center Rehabilitation Services. Claimant objected to Exhibit 9 on the grounds of medical hearsay. In a July 9, 2012, Order, ALJ Avery sustained claimant's objection to Exhibit 3, but overruled the objection to Exhibit 9.

At the July 8, 2011, preliminary hearing in Docket Nos. 1,033,846 and 1,028,933, claimant requested that ALJ Avery order respondent to provide her with a motorized scooter. ALJ Avery issued a September 7, 2011, Order for Medical Treatment granting claimant's request.

At the request of respondent, on November 21, 2011, claimant was evaluated for her low back injury by orthopedic physician Dr. Edward J. Prostic. He diagnosed claimant with degenerative spondylolisthesis at L4-5, symptoms compatible with mild spinal stenosis and osteoarthritis in her hips. Based upon her back and hip conditions, he opined claimant was permanently and totally disabled. When Dr. Prostic saw claimant, she was using a motorized chair. He attributed claimant's lack of mobility to her hip condition. He also noted claimant had: (1) right shoulder surgery; (2) bilateral carpal tunnel releases and a left cubital tunnel release by Dr. Ketchum; (3) septoplasty and sinus surgery; (4) right inguinal herniorrhaphy; and (5) treatment for GERD, asthma, depression and fibromyalgia. Dr. Prostic was not asked to evaluate or rate claimant's upper extremities. He testified that he would defer to Dr. Ketchum's opinions about claimant's upper extremities.

At Dr. Prostic's deposition, respondent introduced several exhibits, including: Exhibit 3, listed as progress notes in the deposition transcript's exhibit index; Exhibit 4, physical therapy notes from St. Francis Hospital and Medical Center Rehabilitation Services; Exhibit 5, an accidental injury report; Exhibit 6, medical records from Topeka Imaging that related to claimant's back injury; Exhibit 7, a letter dated August 3, 2010, from Dr. John M. Ciccarelli to Stephanie Thompson of CorVel; and Exhibit 8, a diagnostic radiology report concerning claimant's lumbar spine and hips. Claimant objected to Exhibits 3 through 5, but not 6 through 8. At Dr. Prostic's deposition, the following colloquy took place:

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[12] Sankoorikal Depo. at 11.

[13] Apparently after ALJ Avery ruled Exhibit 3 to Dr. Sankoorikal's deposition was inadmissible, it was removed from the transcript.

> Q. (Ms. Fisher) Doctor, did you have these records when you did your evaluation, Exhibit 3?
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> A. (Dr. Prostic) No.
>
> Q. And as such, I assume you did not rely on this [as] part of your evaluation process?
>
> A. Correct.
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> Q. The first time you saw them was when Mr. Benedict showed them to you shortly before the deposition?
>
> A. Yes.
>
> MS. FISHER: Object to 3. You're bootlegging in records he didn't rely upon.[14]

Claimant admitted in her brief filed on August 1, 2012, that she made no objection to Prostic Deposition Exhibits 6, 7 and 8. ALJ Avery did not list the exhibits as an issue in the July 16, 2012, Award. However, in his July 9, 2012, Order, ALJ Avery overruled claimant's objection to Exhibit 4, but stated he sustained objections to Exhibits 3, 6, 7 and 8. The July 9, 2012, Order did not mention claimant's objection to Exhibit 5 offered at Dr. Prostic's deposition.

Respondent appealed the ALJ's July 9, 2012, Order to the Board. In a September 5, 2012, Order, the Board declined jurisdiction, because the July 9, 2012, Order was an interlocutory order.

At the request of her attorney, claimant was evaluated by vocational rehabilitation counselor Dick Santner. He personally interviewed claimant on three occasions. He also reviewed respondent's position description of claimant's job; Dr. Sankoorikal's records; a functional capacity evaluation prepared by ARC on February 11, 2011; Dr. Ciccarelli's reports; and a July 18, 2011, report from Dr. Ketchum. Mr. Santner testified claimant was in her mid-60s and has a bachelor's degree in public administration, but has never used that degree. Based upon his interviews with claimant, the restrictions given by Dr. Ketchum, and using his knowledge of the Dictionary of Occupational Titles and the Revised Handbook for Analyzing Jobs, Mr. Santner opined claimant was permanently and totally disabled. Mr. Santner testified that claimant's age is against her. Most employers will not hire someone of claimant's age to perform physically demanding work because it takes time to learn a job and to become proficient at it. Mr. Santner also opined that claimant's education would be irrelevant in finding another job. Mr. Santner opined that based on Dr. Ketchum's restrictions, claimant is permanently and totally disabled.

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[14] Prostic Depo. at 19-20.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[15] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[16]

Respondent argues that the ALJ erroneously found Exhibits 3, 6, 7 and 8 to Dr. Prostic's deposition and Exhibit 3 to Dr. Sankoorikal's deposition to be inadmissible. The Board finds that Exhibits 6, 7 and 8 to Dr. Prostic's deposition are part of the record,[17] as claimant had no objections to those exhibits. Claimant objected to Exhibit 5 of Dr. Prostic's deposition, but ALJ Avery inadvertently did not rule upon the objection. Neither party specifically addressed Exhibit 5 in their briefs to the Board. Therefore, the Board finds that Exhibit 5 to Dr. Prostic's deposition is part of the record. That leaves the admissibility of Exhibits 3 to Drs. Prostic and Sankoorikal's depositions to be addressed. Those exhibits are medical records from Kansas Medical Clinic Family Practice, including the records of claimant's family physician, Dr. Karen E. Bruce.

K.S.A. 44-519 provides:

> Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

In *Boeing Military Airplane Co. v. Enloe*,[18] the Kansas Court of Appeals stated:

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[15] K.S.A. 2007 Supp. 44-501(a).

[16] K.S.A. 2007 Supp. 44-508(g).

[17] Dr. Prostic's deposition is missing Exhibits 3, 6, 7 and 8. Presumably, they were removed after ALJ Avery ruled they were inadmissible. Those exhibits are attached to ALJ Avery's July 9, 2012, Order, as is Exhibit 3 to Dr. Sankoorikal's deposition. The Board considered Exhibits 6, 7 and 8 to Dr. Prostic's deposition in rendering its findings in this matter.

[18] *Boeing Military Airplane Co. v. Enloe,* 13 Kan. App. 2d 128, 130, 764 P.2d 462, *rev. denied* 244 Kan. 736 (1988).

> K.S.A. 44-519 governs the admissibility and competence of expert medical opinions expressed in the form of a certificate or report of examination on the issues of determination and collection of compensation in a workers' compensation proceeding. To be considered as competent evidence in the proceeding, the opinions expressed in the certificate or report must be supported by admissible testimony of the physician or surgeon who issued the certificate or report. K.S.A. 44-519 does not limit the information a testifying physician or surgeon may consider in rendering his or her opinion as to the condition of an injured employee.

The Board finds ALJ Avery correctly sustained claimant's objections to Exhibits 3 of Drs. Prostic and Sankoorikal's depositions. Dr. Prostic specifically testified that he did not have Exhibit 3 when he made his evaluation. The first time Dr. Prostic saw Exhibit 3 was shortly before his deposition, when he was shown Exhibit 3 by respondent's counsel. Dr. Sankoorikal was not asked by either party what role the records had in his evaluation. The responsibility for laying the foundation for an exhibit is upon the party introducing the exhibit. K.S.A. 44-519, as pointed out by the Court in *Boeing*,[19] requires the physician who issued the report or records to testify.

Respondent asserts that claimant had two dates of accident for her bilateral upper extremity injuries: (1) September 6, 2007, when claimant aggravated her left wrist condition and (2) August 19, 2009, when claimant aggravated her right wrist condition. Respondent bases its argument on the fact that the foregoing dates were the dates an authorized treating physician first gave claimant restrictions for her left and right wrist injuries. Claimant counters by contending she sustained one series of accidents, but multiple injuries to her bilateral upper extremities.

K.S.A. 2007 Supp. 44-508(d) states in part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

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[19] *Id.*

The evidence shows that claimant simultaneously sustained her bilateral upper extremity injuries, with her left upper extremity injury worse than the right. In 2006, Dr. Hu diagnosed claimant with right shoulder pain and right bicipital tendinitis, and he noted claimant's request for a right hand mouse tray with a wrist rest had been approved and was helping with claimant's right upper extremity pain. February 2007 notes of respondent's claims adjustor, Ms. Temple, indicated claimant's left and right wrists were being treated by Dr. Hu. Claimant testified that in February 2007, she complained to Mr. Michaels of pain and numbness in both hands, with the left worse than the right.

The Kansas Supreme Court in *Saylor*[20] stated, "Accordingly, the assignment of any single date as the 'accident date' for a repetitive use/cumulative traumas injury is inherently artificial and represents a legal question, rather than a factual determination." Simply put, the evidence shows claimant sustained a single series of repetitive trauma accidents that resulted in multiple injuries. Claimant's legal date of accident for her left and right upper extremity injuries, pursuant to K.S.A. 2007 Supp. 44-508, is September 6, 2007.

Claimant asserts that she gave notice of her bilateral upper extremity injuries when she told her supervisors in February 2007 of having bilateral wrist pain caused by work activities. She was also interviewed by Ms. Temple, which resulted in an employer's report of accident being completed on February 16, 2007. Respondent asserts these events occurred before September 6, 2007, and that notice cannot be given before the legal date of accident. K.S.A. 44-520 states in part:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. . . .

Claimant prudently informed respondent of her work-related injuries as soon as she was aware of them. As previously indicated in this order, claimant's date of accident was artificially created by the Kansas Legislature. The Board finds that claimant is not required to renotify respondent of work-related injuries after the legal date of accident, when claimant has already provided timely notice.

Even if respondent's argument that notice of an accident given before the legal date of accident is not timely was valid, respondent had actual knowledge of claimant's accident within the statutory time limit to give notice. Respondent's claims adjustor Ms. Temple testified that in February 2007, she knew of claimant's work-related injuries. Ms. Temple authorized claimant's September 6, 2007, surgery as work related.

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[20] *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 615, 256 P.3d 828 (2011).

Respondent concedes it received a written claim before September 6, 2007. However, it asserts that in order for there to be timely written claim, claimant must affirmatively send a written claim to respondent after September 6, 2007, and that a document from a third party will not suffice. Claimant asserts written claim can be provided prior to the date of accident. She also asserts that timely written claim pursuant to K.S.A. 44-520a was provided to respondent after the date of accident in the form of medical reports and bills.

The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate it.[21] The same purpose or function has, of course, been ascribed to the requirement for notice found in K.S.A. 44-520.[22] Written claim is, however, one step beyond notice in that it requires an intent to ask the employer to pay compensation. In *Fitzwater*,[23] the Kansas Supreme Court described the test as follows:

> In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?

The purpose of the timely written claim is to ask the employer for compensation. Claimant did this when she completed an accident report in January 2007, and when her attorney sent a letter dated August 14, 2007, to respondent requesting benefits. Although claimant made her written claim before the legal date of accident, she has satisfied the requirements of K.S.A. 44-520a.

The Board also finds that if claimant is required to provide written claim after the legal date of accident, she did so. K.S.A. 44-520a does not specify who must give written claim, only that respondent must be given written claim of the accident within 200 days after the accident or where compensation benefits have been suspended, within 200 days after the last day compensation is paid. Within 200 days after September 6, 2007, respondent received several medical reports and medical bills. The medical bills were in essence a demand for compensation and were paid by respondent. Taking into consideration all of the surrounding circumstances as required by the Kansas Supreme Court in *Fitzwater*, the Board finds respondent received timely written claim for compensation.

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[21] *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

[22] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

[23] *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 166, 309 P.2d 681 (1957).

Respondent stipulated that if the Board found claimant's date of accident for her left and right upper extremity injuries was September 6, 2007, that average weekly wage is not an issue. Accordingly, the Board affirms the ALJ's findings on average weekly wage.

Next, respondent contends claimant did not sustain bilateral shoulder or left elbow injuries arising out of and in the course of her employment. Drs. Phillips and Delgado opined claimant's shoulder injuries were work related. Dr. Ketchum opined claimant's bilateral carpal tunnel syndrome and left ulnar nerve condition were work related. Only Dr. Do opined claimant's right shoulder injury was not work related. However, he provided no causation opinions concerning claimant's left shoulder and elbow injuries. Therefore, Dr. Ketchum's opinion that claimant's left ulnar nerve condition was the result of work activities is uncontroverted as are the causation opinions of Drs. Phillips and Delgado concerning claimant's left shoulder. With regard to the right shoulder, the Board finds the causation opinions of Drs. Phillips, Delgado and Sankoorikal are persuasive. All three of those physicians opined claimant's right shoulder injury was work related. The Board finds claimant's right and left shoulder and left elbow injuries resulted from a series of repetitive accidents arising out of and in the course of her employment with respondent.

The Board adopts ALJ Avery's findings on claimant's functional impairments. Respondent stipulated to ALJ Avery's findings that claimant sustained a 10% functional impairment to each forearm. Respondent also agreed that if the Board found claimant's right and left shoulder and left elbow injuries arose out of and in the course of her employment, then it concedes ALJ Avery correctly determined claimant sustained functional impairments of 10% to the left elbow, 10% to the right shoulder and 5% to the left shoulder.

Respondent next contends the rebuttable presumption set out in K.S.A. 44-510c(a)(2) does not apply because claimant had separate dates of accident for her left and right upper extremities. That argument is nullified by the Board's finding that claimant sustained a single series of repetitive trauma accidents on September 6, 2007.

Respondent also asserts that because claimant did not suffer a complete loss of use of her right and left hands, but sustained only a partial loss of use, there is no rebuttable presumption she is permanently and totally disabled. That argument ignores *Casco*.[24] Casco received a 27% functional impairment for the left upper extremity and 6% for the right upper extremity. The Court in *Casco* stated:

> When a single injury causes the claimant to suffer the loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof, we apply the *Pruter* analytical model. Our analysis begins with determining whether Casco is permanently and totally disabled. See *Pruter*, 271 Kan. at 875. Because Casco

[24] *Casco v. Armour Swift-Eckrich,* 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

> suffers from the loss of both arms, K.S.A. 44-510c(a)(2) establishes a rebuttable presumption that he is permanently, totally disabled. If that presumption is not rebutted by evidence in the record, Casco's compensation must be calculated in accordance with K.S.A. 44-510c as a permanent total disability.[25]

Pursuant to *Casco*, the Board finds there is a rebuttable presumption that claimant is permanently and totally disabled.

Respondent next contends that if claimant is permanently and totally disabled, it is not attributable to her upper extremity injuries, but instead is attributable to her many other physical ailments, including her back and hips. Dr. Ciccarelli opined claimant's back condition was only a contributing factor, not the primary factor, in causing claimant's disabilities. Even after claimant required the use of a motorized scooter, she was able to return to work. Dr. Ketchum's January 18, 2011, notes indicated claimant felt she could no longer do her job. On March 22, 2011, Dr. Ketchum indicated claimant reached maximum medical improvement and imposed a two-pound lifting restriction on claimant for her upper extremities. Dick Santner opined that it was Dr. Ketchum's restriction with regard to claimant's upper extremities of lifting no more than two pounds that rendered claimant unemployable. Mr. Santner also considered claimant's age, education and transferrable job skills in rendering his opinion. Simply put, the Board finds claimant proved by a preponderance of the evidence that she is permanently and totally disabled.

CONCLUSION

1. ALJ Avery correctly sustained claimant's objections to Exhibits 3 to Drs. Prostic and Sankoorikal's depositions. All other exhibits to the depositions of Drs. Prostic and Sankoorikal's depositions are part of the record considered by the Board.

2. The date of claimant's series of repetitive trauma accidents is September 6, 2007.

3. Claimant gave timely notice of her series of repetitive trauma accidents to respondent.

4. Claimant provided timely written claim to respondent.

5. The Board affirms ALJ Avery's findings concerning claimant's average weekly wage.

6. Claimant sustained right and left shoulder and left elbow injuries by accident arising out of and in the course of her employment with respondent.

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[25] *Id.*, at 528-529.

7. Claimant sustained the following functional impairments:

a. 10% to the right upper extremity at the level of the right shoulder;

b. 5% to the left upper extremity at the level of the left shoulder;

c. 10% to the right upper extremity at the level of the right forearm for right carpal tunnel syndrome;

d. 10% to the left upper extremity at the level of the left forearm for left carpal tunnel syndrome; and

e. 10% to the left upper extremity at the level of the left elbow for left cubital tunnel syndrome.

8. Respondent is entitled to a credit, pursuant to K.S.A. 2007 Supp. 44-501(c), for claimant's preexisting functional impairment of 6% to the right shoulder.

9. There is a rebuttable presumption that claimant is permanently and totally disabled.

10. Claimant is permanently and totally disabled.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[26] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the July 16, 2012, Award entered by ALJ Avery as follows:

Shirley A. Damron is granted compensation from the State of Kansas and its insurance fund for a September 6, 2007, accident and resulting disability.

Based upon an average weekly wage of $408.80, for the period ending October 31, 2011, Ms. Damron is entitled to receive 34.29 weeks of temporary total disability benefits at $272.55 per week, or $9,345.74, plus 78.57 weeks of permanent partial disability benefits at $272.55 per week, or $21,414.25. The 78.57 weeks of permanent partial disability benefits at $272.55 per week totaling $21,414.25 are comprised of the following:

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[26] K.S.A. 2011 Supp. 44-555c(k).

8.73 weeks of permanent partial disability benefits for a 4% permanent partial disability for the right shoulder (10% functional impairment for the right shoulder minus 6% preexisting functional impairment for the right shoulder);

10.91 weeks of permanent partial disability benefits for a 5% permanent partial disability for the left shoulder;

19.31 weeks of permanent partial disability benefits for a 10% permanent partial disability for the right forearm;

19.31 weeks of permanent partial disability benefits for a 10% permanent partial disability for the left forearm;

20.31 weeks of permanent partial disability benefits for a 10% permanent partial disability for the left elbow.[27]

Based upon an average weekly wage of $589.05, beginning November 1, 2011, Ms. Damron is entitled to receive 239.97 weeks of permanent total disability benefits at $392.72 per week, or $94,240.01, for a permanent total disability. The total award is not to exceed $125,000.00.

As of February 25, 2013, Ms. Damron is entitled to receive 34.29 weeks of temporary total disability benefits at $272.55 per week in the sum of $9,345.74, plus 78.57 weeks of permanent partial disability benefits at $272.55 per week in the sum of $21,414.25, plus 69 weeks of permanent total disability benefits at $392.72 per week in the sum of $27,097.68, for a total due and owing of $57,857.67, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $67,142.33 shall be paid at $392.72 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

[27] The 34.29 weeks of temporary total disability benefits were divided equally among the five scheduled injuries in computing the number of permanent partial disability weeks for each scheduled injury.

Dated this ____ day of February, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Brad E. Avery, Administrative Law Judge